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Nos. 95-289 and 95-290

In the Supreme Court of the United States

OCTOBER TERM, 1995

DEBORAH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

GILBERT ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals employed the correct standard of review in assessing the sufficiency of the evidence.

2. Whether the court of appeals properly considered the testimony of government witness Larita Mitchell in assessing the sufficiency of the evidence against petitioner Williams.

3. Whether there was sufficient evidence that petitioner Ross participated in the conduct of an enterprise through a pattern of racketeering activity.

4. Whether the district court correctly instructed the jury that it could infer knowledge from deliberate ignorance.

5. Whether the district court erred in restraining petitioner Ross's assets prior to sentencing pursuant to the All Writs Act, 28 U.S.C. 1651.

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OPINION BELOW

The opinion of the court of appeals (95-289 Pet. App. 1a-24a; 95-290 Pet. App. 1a-24a)[1] is reported at 53 F.3d 507.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1995. A petition for rehearing was denied on June 9, 1995. Pet. App. 25a. The petitions for a writ of

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[1] When citing the court of appeals' opinion in this brief, we refer exclusively to the appendix to the petition in No. 95-290.

certiorari were filed on August 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); one count of conspiring to engage in racketeering, in violation of 18 U.S.C. 1962(d); and numerous counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Williams was convicted on nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). Gov't C.A. Br. 2-3.[2] Petitioner Williams was sentenced to 41 months' imprisonment, to be followed by a three-year term of supervised release. In addition, she was ordered to pay $1,814,896 in restitution to the New York State Department of Social Services (DSS) and to forfeit $50,000 to the United States. Petitioner Ross was sentenced to 46 months' imprisonment, to be followed by a three-year term of supervised release. He was also ordered to pay $612,855 in restitution to DSS and to forfeit $40,000 to the United States. *Id.* at 3-4; Pet. App. 3a-4a. The court of appeals affirmed the convictions, but remanded for reconsideration of the restitution orders. Pet. App. 1a-24a.

1. a. From February 1990 through June 1991, petitioners participated in a racketeering enterprise that defrauded the New York State Medicaid System

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[2] Petitioner Ross was acquitted on two counts of money laundering. Gov't C.A. Br. 3.

of more than $8 million. The enterprise, headed by Mohammed Sohail Khan, operated through four sham clinics located in the New York City area. The scheme operated as follows: Indigent patients came to the Khan clinics to obtain prescriptions for expensive drugs for which they had no medical need, and later resold the drugs on the street for cash.

To obtain the prescriptions, the patients provided the Khan clinics with valid Medicaid recipient numbers, underwent medically unnecessary procedures and tests, and gave blood samples. The patients were typically seen by Physicians' Assistants (PAs), who were fully aware of the fraud and made no pretense of legitimate treatment. Doctors were rarely on the premises at any of the clinics, and provided no meaningful supervision over the PAs. Pet. App. 4a-5a.

Medicaid was billed for each patient visit and office test. Moreover, each blood sample was sent to Clin Path, a medical laboratory located in New Jersey, which, in turn, billed Medicaid for every blood test. Clin Path "kicked back" 27% of its Medicaid receipts to Khan. Khan was the primary organizer of the scheme: he leased the space for the clinics, purchased what limited medical supplies were provided, and hired and paid the PAs. Khan advertised for the physicians in the New York Times, promising "[v]ery, very good $$." Physicians were essential to the success of the operation, because only a physician could qualify as a Medicaid provider. Pet. App. 5a.

The physicians received Medicaid payments for office visits and tests purportedly performed at the clinics. Of those payments, the physicians would "kick back" 30-40% to Khan. Eventually, the physicians' payments to Khan were disguised as rent payments. Under this arrangement, each physician en-

tered into a lease agreement with Khan in which the physician agreed to pay Khan rent of $1500 per week —an amount that did not correspond to the actual rent paid by Khan for the premises. Pet. App. 5a-6a.

The Khan clinics were unusual in many ways. They lacked substantial medical equipment and were very dirty. In some of the clinics, signs instructed patients not to discuss their prescriptions with one another. The patients were not a normal mix of children, women, and the elderly, but were mainly men between the ages 25 and 45. There were never any emergencies or hospital referrals, and every patient was a Medicaid recipient. Finally, the clinics had a policy of limiting follow-up visits, expressed, for example, by a sign at one of the clinics that stated "no more old patients for tomorrow." This medically indefensible policy reduced the number of less-lucrative second visits the clinics might otherwise expect. To accomplish the same purpose, repeat patients often were treated as "first-time" patients at several of the clinics. Pet. App. 6a.

The physicians rarely examined any patients themselves. Rather, the PAs would examine the patients, seeing each one for only a few minutes. Clinic records indicated that virtually all the patient complaints were described in one of a very limited number of ways, a coincidence that was statistically impossible. Nearly all the blood samples taken were analyzed under one of four highly specialized and expensive tests. Hearing tests were ordered for patients whose charts indicated no hearing problem. Moreover, EKG tests lacked the required interpretation, and some EKG graphs were cut into pieces and distributed among the files of various patients. Two physicians who worked at the clinics testified

that they realized almost immediately that the clinics were not legitimate, and that they were fraudulently billing Medicaid. Pet. App. 6a-7a, 10a.

b. Petitioner Williams was one of the physicians employed at the Khan clinics. Khan testified at trial that Williams was aware of Khan's relationship with Clin Path and that Williams agreed to pay Khan 40% of her Medicaid receipts. To this end, Williams entered into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent. Khan further testified that in May 1991 he was notified that he and all the physicians were to be excluded from Medicaid. He said that when he told Williams that he was going to close the clinics because he did not "want to be a front anymore," Williams volunteered to take over as the "front," with Khan paying her expenses from the money he received from Clin Path. Pet. App. 8a-9a.

Dr. Sadaphal, another physician who worked at the clinics, testified that she became concerned about the remarkably similar diagnoses on all the patient charts, and asked Williams about the similarities. Williams "misled" Sadaphal by claiming that the similarities were representative of the community in which the clinics were located. Patient Larita Mitchell testified that after giving the receptionist a list of fake ailments, she met with Williams in an examination room. Williams did not ask her any questions or perform a medical exam. Rather, Williams simply told Mitchell to "go next door and take blood." After giving blood, Mitchell obtained her prescription, had it filled, and resold the drugs on the street. Pet. App. 9a.

An examination of the charts of patients seen by Williams and by the PAs supervised by her reflected

no real evidence of medical treatment. Rather, the charts showed that unwarranted tests were done on the patients, and that unwarranted medication was prescribed for them. Moreover, a DSS physician reviewed the charts for 25 of Williams' patients and found that the patient complaints were strikingly similar. All 25 patients complained of ulcers, and all but two complained of both hypertension and asthma. All three of the patients personally seen by Williams were diagnosed with hypertension, notwithstanding that one patient's chart indicated a normal blood pressure, and another contained no blood pressure reading at all. Moreover, a review of the 25 charts showed that Williams had approved and billed Medicaid for 22 hearing tests ordered by the PAs, even though the patients' histories, set forth in the charts, indicated no hearing loss. The charts also showed that Williams had authorized complex blood tests for all but one of the 25 patients, and made no attempt to follow up abnormal results. Gov't C.A. Br. 25-26.

c. Petitioner Ross was another physician employed at the clinics. At their first meeting, Khan explained that Ross would have to give him 40% of his Medicaid receipts, and that they would enter into a lease agreement to mask the fee-splitting. Physician's Assistant Melville Ferns, who was present at the meeting, explained that all the patients came in with the same complaints, and that Ross would write them prescriptions. Ross "swallowed," but said nothing. Ross subsequently agreed to associate himself with one of the clinics. Gov't C.A. Br. 39. Thereafter, Ross was present at the clinic for approximately three days each week, and met with staff members in the area where signs were posted

indicating that only new patients were welcome. During an early meeting, Khan told Ross that a patient that had been seen by another clinic physician would be seen by Ross and treated as a "new" patient. Khan explained that by recycling patients in that fashion, each doctor could maximize profits by charging Medicaid for a first comprehensive visit and certain testing, including a full blood work-up. Khan showed Ross the notebook used to keep track of which patients would be "new" for which doctor. Ross looked at the notebook and responded, "Looks like all the corners are covered." Pet. App. 12a; Gov't C.A. Br. 40.

Shortly after Ross joined the clinic, Ferns told him that Khan had ordered a prohibition on urinalysis because such tests were not profitable. Ferns suggested that Ross speak to Khan about the prohibition, but Ross did nothing. On another occasion, Ferns told Ross that he routinely prescribed drugs without seeing test results, and that when the lab results arrived he did not review them. Ross took no action in response to that information. In March 1991, after a DSS representative had taken custody of 20 of Ross's files, Ferns advised Ross that they should "put a lid on Mevacor"—a high cholesterol drug—because the clinic was routinely prescribing it for patients whose blood tests showed a normal cholesterol level. Ross agreed, and sent Ferns a letter "directing" Ferns not to prescribe Mevacor without proof of high cholesterol. Pet. App. 12a; Gov't C.A. Br. 41, 103-104. A subsequent review of the charts of patients supervised by Ross revealed patently unnecessary testing. Gov't C.A. Br. 42.

2. a. Ross testified at trial that he had no knowledge of the ongoing fraud at the Khan clinics. Gov't C.A. Br. 45-52.

The district court instructed the jury:

> In determining whether these defendants acted knowingly, you may consider whether the defendants deliberately closed their eyes to what otherwise would have been obvious.
>
> I would like to point out that the necessary knowledge cannot be established by showing that a defendant was careless, negligent or foolish. However, one may not willfully and intentionally remain ignorant of a fact material and important to his or her conduct in order to [escape] the consequences of the criminal law. If you find beyond a reasonable doubt that a defendant was aware that there was a high probability that the representations charged in the indictment were fraudulent but deliberately and consciously avoided confirming this fact, then you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

Gov't C.A. Br. 106.

b. Before trial, the court issued an order, pursuant to 18 U.S.C. 981(b)(1) and 1963(d)(1), restraining certain of petitioner Ross's assets, including real property, bank accounts, and investment accounts. The order permitted the release of assets for living expenses and the release of $100,000 for attorney's fees through sentencing. Following the jury's verdict of guilty as to Ross, the district court issued an order pursuant to the All Writs Act, 28 U.S.C. 1651(a), restraining Ross's assets until sentencing.

The court cited its intention at sentencing to order "substantial restitution" reflecting "all of the losses caused by [Ross's] activities" and found "a real question" as to the existence of "liquid assets" to satisfy that restitution. Gov't C.A. Br. 166-167. The court found "no logic to the position that the [c]ourt is powerless to enter a restraining order after a [guilty verdict] simply because sentencing has been delayed so that a pre-sentence report may be prepared." *Id.* at 168. The court also noted its authority under 18 U.S.C. 3663 to enter a restraining order at sentencing.[3]

At sentencing, the court found nothing to contradict the presentence report's determination that Ross had a net worth in excess of half a million dollars, and it ordered Ross to pay restitution in the amount of $612,855, to be paid according to a schedule that would be set at a subsequent proceeding. The district court invited Ross's counsel to submit a brief on the issue of whether maintaining a restraining order on his assets would constitute a denial of Ross's right to counsel. Ross's counsel declined the court's invitation. Gov't C.A. Br. 168-169.

At the subsequent hearing, the district court evaluated Ross's assets and reaffirmed its earlier

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[3] 18 U.S.C. 3663(h)(1)(B) provides that an order of restitution "may be enforced * * * by the United States * * * in the same manner as a judgment in a civil action." Federal Rule of Civil Procedure 69(a) allows the federal government to enforce civil judgments in accordance with state practice and procedure. New York Civil Practice Law and Rules § 5222 (McKinney Supp. 1995) provides for the issuance of a restraining order to prevent a judgment debtor from dissipating his assets.

order of restitution. The court ordered that the restitution payments be made according to a schedule determined by the Probation Department as a special condition of supervised release. The court also restrained Ross's assets pending appeal, again citing its authority under 18 U.S.C. 3663(h).[4] The court stated that it would "entertain an application to adjust the restraining order to the extent necessary to pay reasonable living expenses." Ross has never made such application. Pet. App. 23a; Gov't C.A. Br. 169.

3. The court of appeals affirmed petitioners' convictions, but remanded for reconsideration of the restitution orders. Pet. App. 1a-24a. Applying the standard recited in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"), the court rejected petitioners' claim that the evidence was insufficient to establish their knowledge of the scheme to defraud Medicaid. Pet. App. 8a-10a, 12a-13a.

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[4] The government further noted, without dispute from Ross, the court's authority under Federal Rule of Criminal Procedure 38(e) to enter a restraining order pending appeal to ensure compliance with restitution. Gov't C.A. Br. 169. Rule 38(e) provides:

> A sanction imposed as part of the sentence pursuant to 18 U.S.C. * * * 3556 [order of restitution] may, if an appeal of the conviction or sentence is taken, be stayed * * *. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order * * *.

The court also rejected Williams' argument that Larita Mitchell's testimony should be disregarded because Mitchell had perjured herself at trial. The alleged perjury consisted of Mitchell's testimony that she remembered her visit with Williams because she had gone to the clinic that day to obtain money to pay her son's Boy Scout dues; according to Williams, Mitchell did not have a son in the Boy Scouts. Pet. App. 9a-10a; Gov't C.A. Br. 58 n.*. The court noted that the government had made a "painstaking investigation" into the allegations that Mitchell's testimony was perjured, and that the results were inconclusive. The court further found no evidence that the government had knowledge of any perjury when it proffered Mitchell as a witness. Finally, the court held, Mitchell's credibility was vigorously disputed before the jury. Pet. App. 10a.

The court also rejected Ross's contention that his conduct did not amount to a pattern of racketeering activity because he worked at the Khan clinics for only nine weeks. The court held that the predicate acts of racketeering had the requisite "relatedness" and "continuity" because all the predicate acts of mail fraud were performed in the same way with the same purpose, and because the clinics regularly engaged in defrauding Medicaid. Pet. App. 13a.

The court further rejected petitioners' claim that the district court's conscious avoidance charge was error because it failed to include certain "actual belief" balancing language—*i.e.*, that the jury could not infer the defendant's knowledge of a fact if the defendant actually believed that that fact did not exist. The court held that the instruction given, to which petitioners offered no objection at trial, did not amount to plain error. The court found that although

the instruction did not include the "actual belief" language preferred by that Circuit, the district court's charge as a whole set forth the requisite level of knowledge and made clear that the necessary knowledge could not be established by showing that a defendant was "careless, negligent, or foolish." Pet. App. 16a-17a.

The court remanded on the issue of restitution. The court found that the record did not indicate whether the district court, in setting the amount of restitution, considered the financial resources of the defendants or the financial needs and earning ability of the defendants and their dependents, as required by 18 U.S.C. 3664(a). Pet. App. 22a. The court also held that the district court had improperly ordered that the restitution payments be made according to a schedule determined by the Probation Department. *Id.* at 23a.

ARGUMENT

1. Petitioners argue (95-289 Pet. 33-40; 95-290 Pet. 49-56) that in reviewing the sufficiency of the evidence, the court of appeals failed to apply the standard articulated in *Jackson* v. *Virginia*, 443 U.S. 307, 316-318 (1979), and *In re Winship*, 397 U.S. 358 (1970). That claim is incorrect. In upholding the sufficiency of the evidence, the court, citing *Jackson* v. *Virginia*, 443 U.S. at 319, correctly stated that the standard of review was whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pet. App. 8a. Applying that standard, the court found the evidence sufficient to

establish petitioners' knowing involvement in the conspiracy charged.[5]

As to petitioner Williams, the court relied upon the following factors as establishing her knowledge of the scheme to defraud Medicaid: Khan's testimony that Williams was aware of his relationship with Clin Path and that she agreed to pay him 40% of her Medicaid receipts; Williams' entry into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent; Williams' volunteering to take over as the "front" when Khan told her that he was going to close the clinics; Williams' misleading of Dr. Sadaphal upon hearing Sadaphal's concerns regarding the similar diagnoses on all the patient charts; and Mitchell's testimony that Williams gave her a prescription without performing a medical exam. Pet. App. 8a-9a. That evidence was sufficient to establish Williams' knowledge of the illegal scheme beyond a reasonable doubt.

As to petitioner Ross, the court relied on the expert testimony establishing the fraudulent nature of Ross's patients' charts; Ross's presence three days

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[5] Petitioners also claim (95-289 Pet. 38-39; 95-290 Pet. 55-56) that reliance on this language in *Jackson* v. *Virginia* undercuts the "beyond a reasonable doubt" standard by suggesting that only one juror need be persuaded of a defendant's guilt beyond a reasonable doubt. In reciting that the standard was whether "*any* rational trier of fact" could have found guilt beyond a reasonable doubt, however, the *Jackson* Court was merely making the observation that the sufficiency inquiry does not require an appellate court to "ask itself whether *it* believes that the evidence at the trial established guilty beyond a reasonable doubt." 443 U.S. at 318-319. Rather, explained the Court, the relevant question is whether "*any* rational trier of fact" could have so found. *Id.* at 319.

a week at the clinic, where he had ample opportunity to observe the "utterly inadequate facilities" as well as the posted signs indicating that only new patients were welcome; Ross's attempt to cover his tracks, after the DSS had taken custody of some of his patients' files, by instructing that a certain drug be prescribed only when the condition for which it should be prescribed was present; and Ross's failure to do anything upon being informed that all of his patients came in with the same complaints, and upon being asked to speak to Khan about a nonsensical prohibition on urinalysis. Pet. App. 12a-13a. As the court of appeals correctly found, that evidence was sufficient to establish Ross's knowledge of the clinics' fraudulent nature. *Ibid.*

Petitioners rely (95-289 Pet. 34-38; 95-290 Pet. 51-55) on an article authored by Second Circuit Chief Judge Jon Newman, to the effect that appellate courts have failed to take the "beyond a reasonable doubt" standard seriously in assessing sufficiency of the evidence claims. Whether other courts have properly applied the correct standard of review to sufficiency claims, however, has no bearing on this case; the factors relied upon by the court of appeals in this case clearly established petitioners' guilt beyond a reasonable doubt.

2. Petitioner Williams argues (95-289 Pet. 13-16, 40-50) that, in conducting its sufficiency analysis, the court of appeals improperly relied on Larita Mitchell's testimony because evidence discovered after trial showed that Mitchell had perjured herself. In particular, petitioner claims that Mitchell lied in testifying that she remembered her visit to the clinic and her treatment by Williams because she had gone to the clinic that day to obtain money to pay her son's

Boy Scout dues. According to Williams, evidence discovered after trial (which petitioner fails to disclose here) showed that Mitchell's seven-year-old son was not old enough to be a Boy Scout and that in any event the child was not in Williams' custody at the time of Mitchell's visit to the clinic.

Petitioner cannot complain of the court of appeals' consideration of Mitchell's testimony in assessing the sufficiency of the evidence against her. Following the post-trial discovery of the alleged perjury, petitioner made no attempt to seek a new trial or to present evidence of the alleged perjury to the district court. Moreover, the court of appeals found that the government had conducted a "painstaking investigation" into the allegations, but that the results were "inconclusive." Pet. App. 10a. The court further found that petitioner had presented no evidence that the government had knowledge of any perjury when it proffered Mitchell as a witness. *Ibid.*

In any event, Mitchell's alleged perjury went to a collateral issue, and not to the core of her testimony that she visited the clinic and that Williams issued her a prescription without first conducting an examination of any kind. Indeed, Mitchell's meeting with Williams was fully corroborated by the patient file prepared by Williams and introduced into evidence at trial. Gov't C.A. Br. 58 n.*. Moreover, Mitchell's credibility was thoroughly challenged on cross-examination. That examination disclosed Mitchell's drug addiction, her prior conviction for drug possession, and her possible fear of prosecution. Evidence bearing on whether or not her son was a Boy Scout at the time in question would have added little

of impeachment value to the cross-examination.[6] Finally, even absent Mitchell's testimony, the evidence amply established the existence of the fraudulent scheme and Williams' knowing participation in that scheme. The court of appeals' reliance on Mitchell's testimony in assessing the sufficiency of the evidence would, at most, be harmless error.

3. Petitioner Ross argues (95-290 Pet. 56-59) that the evidence failed to establish that his conduct amounted to a "pattern of racketeering activity" be-

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[6] Petitioner relies (95-289 Pet. 40-41) on *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), for the proposition that the court of appeals improperly relied on Mitchell's testimony in making its assessment as to the sufficiency of the evidence. Petitioner's reliance on *Communist Party* is misplaced. In *Communist Party*, this Court, having granted certiorari, was faced with an "uncontested challenge" that one of the administrative findings under review "was in part the product of three perjurious witnesses." *Id.* at 124. To avoid unnecessary decision of the constitutional issues on which certiorari was granted, see *id.* at 122, the Court remanded the case to the agency for a determination of whether the agency had based its decision on tainted or untainted evidence. That disposition does not suggest that a remand to the court of appeals or district court would be appropriate here. Unlike in *Communist Party*, the charge of perjury here was not "uncontested." *Id.* at 124. In addition, while the alleged perjury here was collateral, the perjury in *Communist Party* was "not inconsequential in relation to the issues on which the [agency] had to pass." *Id.* at 123. Unlike petitioner, who did not present her claim of perjury to the district court, the petitioner in *Communist Party* had unsuccessfully sought leave to adduce additional evidence before the Board to support its claim of perjury. *Id.* at 119-120. Accordingly, *Communist Party* does not support petitioner's claim.

cause he was at the Khan clinics for only nine weeks. The court of appeals correctly rejected that claim.

In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989), the Court held that, to form a pattern, the predicate acts of racketeering in a RICO case must be "related" and must "amount to or pose a threat of continued criminal activity." Criminal acts are related if they have the "same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 240. The Court defined "continuity" to include "either * * * a closed period of repeated conduct, or * * * past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. When a RICO case has been commenced before continuity can be established by proof of "a series of related predicates extending over a substantial period of time," then "liability depends on whether the *threat* of continuity is demonstrated." *Id.* at 242.

Although the Court in *H.J. Inc.* stated that continuity is "centrally a temporal concept," it also made clear that "the requisite threat of continuity" may be present even though "the number of related predicates involved may be small and they may occur close together in time." 492 U.S. at 242. The Court explained that a "RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit," or if "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." *Ibid.* Finally, the Court held that facts external to the predicate acts, such as the nature of the RICO enterprise, may supply the threat of continued criminal activity. For example, the threat of continuity may be established

by showing that the predicate acts are part of an ongoing entity's regular way of doing business. *Id.* at 243. The question whether the charged predicate acts establish a threat of continued racketeering activity "depends on the specific facts of each case." *Id.* at 242.

As the court of appeals correctly held (Pet. App. 13a), the *H.J. Inc.* standards are met here. Ross's ten predicate acts of mail fraud were performed in the same way and with the same purpose: to defraud Medicaid. Moreover, the requisite threat of continuity was present here because the Khan clinics regularly engaged in defrauding Medicaid—indeed, the perpetration of such fraud appears to have been the sole reason for the clinics' existence.

Petitioner mistakenly asserts (95-290 Pet. 57-58) that the court of appeals' conclusion that his conduct amounted to a pattern of racketeering conflicts with the Court's decision in *Reves* v. *Ernest & Young*, 113 S. Ct. 1163 (1993). In *Reves*, this Court construed the phrase "to conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs" to require an element of managing or operating the enterprise. The Court explained (*id.* at 1170) (footnote omitted):

> Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required.

Here, the proof squarely established that petitioner had a role in directing the clinics' affairs. Like the

other physicians employed by the clinic, Ross performed unnecessary tests on patients, billed Medicaid for the office visits and the medical tests, and kicked back 40% of his Medicaid receipts to Khan. Moreover, a physician such as Ross may reasonably be found to be a supervisor of the Physicians Assistants, whose activities were the primary means of carrying out the fraudulent schemes. Thus, petitioner had a role in directing or managing the illegal scheme, which established his "participat[ion] in the operation or management of the enterprise itself." *Id.* at 1172.[7]

4. Petitioners also contend (95-289 Pet. 17-33; 95-290 Pet. 34-49) that the district court erred in giving the jury a "deliberate ignorance" instruction on the knowledge element of the offense. They argue (95-289 Pet. 18-19, 25-26; 95-290 Pet. 34-35, 42-43) that the

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[7] Ross also raises a vagueness challenge to the pattern of racketeering element of the RICO statute. He relies on the opinion concurring in the judgment in *H.J. Inc.*, 492 U.S. at 251-256, in which Justice Scalia, joined by three other Justices, expressed doubts about whether the RICO "pattern" requirement could withstand a constitutional vagueness challenge. To succeed on such a vagueness claim, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975). The defendant must show that the statute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Petitioner's active participation in this case of ongoing Medicaid fraud unmistakably satisfied the pattern requirement On ten separate occasions over a two-month period, Ross submitted invoices to Medicaid for patently unnecessary tests. Those acts, as Ross well knew, were part of the clinics' regular way of doing business.

instruction was improper because it permitted the jury to convict them on proof of mere negligence; that the instruction was legally insufficient because it did not contain certain balancing language; and that there was no evidentiary basis for such a charge.

This Court has denied several recent petitions for writs of certiorari raising similar issues. See *Palomino-Figueroa* v. *United States*, 115 S. Ct. 640 (1994); *Caterino* v. *United States*, 113 S. Ct. 129 (1992); *Marquez* v. *United States*, 504 U.S. 975 (1992); *Salgado-Aristizabel* v. *United States*, 504 U.S. 942 (1992); *Tomala* v. *United States*, 504 U.S. 932 (1992). The government acquiesced in the petition for certiorari in *Tomala*, and the government also suggested that the petitions in *Salgado-Aristizabel* and *Marquez* be held pending this Court's disposition of *Tomala*. The petitions in all of those cases were nonetheless denied. There is no reason for a different result here.

a. The instruction given in this case did not dilute the knowledge requirement of petitioners' offenses or otherwise permit their conviction on proof of mere negligence. The second paragraph of the district court's instruction concerning the knowledge element of the offenses largely tracked Model Penal Code § 2.02(7), which states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

That definition of knowledge was approved by this Court in *Leary* v. *United States*, 395 U.S. 6, 46 & n.93 (1969), and *Turner* v. *United States*, 396 U.S. 398, 416

& n.29 (1970). The Model Penal Code definition of knowledge is commonly used in so-called "deliberate ignorance" or "conscious avoidance" cases, in which the defendant asserts that he lacked knowledge of a crucial material fact. In fact, however, the instruction is more accurately described as a definition of the level of certainty required to constitute knowledge of a fact for purposes of the criminal law. Congress could not have viewed the absence of absolute certainty as equivalent to the absence of knowledge, for in many cases a defendant would learn of incriminating facts only from other persons, rather than from direct observation, or would avoid learning the facts in order to maintain a pretense of ignorance. The "high probability" formulation accords with the common sense understanding of the level of certainty required to constitute knowledge in those situations.

Contrary to petitioners' contention (95-289 Pet. 18-19, 25-26; 95-290 Pet. 34-35, 42-43), the instruction in this case did not invite the jury to convict them on a theory of negligence. The instruction stated that the jury could find that petitioners acted knowingly if it found beyond a reasonable doubt that they were "aware that there was a high probability that the representations charged in the indictment were fraudulent but deliberately and consciously avoided confirming this fact." Gov't C.A. Br. 106. The instruction expressly cautioned, however, that the necessary knowledge could not be established by showing that petitioners were "careless, negligent or foolish." *Ibid.*

Petitioners argue (95-289 Pet. 27-29; 95-290 Pet. 44-45) that the conscious avoidance instruction was insufficient as a matter of law because it failed to include any "actual belief" balancing language—*i.e.*,

that a defendant's knowledge was not established by an awareness of a high probability of a fact's existence if he actually believed that the fact did not exist. Petitioners correctly note that in *United States* v. *Feroz*, 848 F.2d 359, 360-361 (2d Cir. 1988) (per curiam), the Second Circuit stated that "in giving the conscious avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." The court directed that the prosecutor should request that the "high probability" and "actual belief" language be incorporated into every conscious avoidance charge. The court nonetheless held that a conscious avoidance instruction that included neither "actual belief" nor "high probability" balancing language, while "incomplete," did not constitute plain error.

In keeping with the court's directive in *Feroz*, the government in this case requested that the "actual belief" language be included in the charge. The district court failed to comply with that request, however, and petitioners did not object to the omission. Gov't C.A. Br. 111 n.* The court did, however, instruct that "the necessary knowledge cannot be established by showing that a defendant was careless, negligent or foolish." *Id.* at 106. Moreover, during deliberations, in response to a jury request for further instructions concerning the agreement necessary to establish a conspiracy, the district court charged the jury (*id.* at 108 (emphasis omitted)):

> If you find that a doctor who you are considering went to work at one of these clinics

> and that that doctor's activities furthered the fraudulent scheme but that doctor did not know that a fraud was going on, the mere fact that that doctor worked at that clinic without knowledge or intent to further the fraudulent activity, that would not make that doctor a member of the conspiracy, because the doctor would not knowingly and intentionally in any way associate himself or herself with the fraud, and therefore there would never be a basis on which you could find that, impliedly or tacitly, that doctor agreed to participate in a fraudulent scheme or fraudulent conspiracy.
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> * * * * *
>
> * * * It is * * * absolutely required that you find before you convict a defendant that that defendant knowingly and intentionally acted to further the aims of the conspiracy. The fact that a person simply worked there, if that person did not know of any fraud going on and did not intend to further any fraud by their action, that would not justify any verdict of guilty in this case.

Given these explicit instructions as to the level of knowledge necessary to convict, the court of appeals properly found (Pet. App. 17a) that the district court's failure to include the "actual belief" language in the conscious avoidance instruction "did not constitute plain error 'going to the very essence of the case.'"

b. Petitioners also argue (95-289 Pet. 19-20, 30-31; 95-290 Pet. 36-37, 46-48) that the deliberate ignorance instruction was improperly given in this case because the evidence at trial did not present a question of conscious avoidance. The evidence, however, was

sufficient to establish that if petitioners were unaware of the Medicaid fraud, their ignorance was deliberate. Petitioners ignored the obvious physical inadequacies of the Khan clinics, they failed to question the blatant and repetitive similarities in the patient charts, they authorized expensive tests and prescriptions that were unsupported by the patient files, and they received large Medicaid payments in exchange for doing virtually nothing. When a physician voiced concern to petitioner Williams that "something was wrong" because all the patient charts were nearly identical, Williams took no steps to assure herself of the legitimacy of the clinic's practice, but summarily dismissed the physician's concern by responding that the suspicious similarities were representative of the community in which the clinics were located. Similarly, when PA Ferns told petitioner Ross that all of the patients complained about essentially the same ailments, and directed that Ross would write them prescriptions, Ross "swallowed" and said nothing. When Ferns told Ross that he should talk to Khan about Khan's prohibition on urinalysis because they were not profitable, Ross did nothing. And when Ferns told Ross that he routinely prescribed drugs without seeing test results, and that when the lab results arrived he did not review them, Ross did nothing. In sum, the evidence was more than adequate to justify a conscious avoidance charge.[8]

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[8] Petitioners claim (95-289 Pet. 30-31 & n.8; 95-290 Pet. 47-48 & n.16) that unlike the Fifth, Ninth, Tenth, and Eleventh Circuits, which require an evidentiary showing that the defendant pursued a conscious course of deliberate ignorance, the Second Circuit "allows use of a conscious avoidance charge

5. Finally, petitioner Ross contends (95-290 Pet. 59-64) that, following his conviction, the district court improperly restrained his assets pursuant to the All Writs Act, 28 U.S.C. 1651, in order to preserve those assets for restitution at sentencing. That contention is moot. The district court's order restraining Ross's assets pending sentencing, issued pursuant to the All Writs Act, was in effect only for the brief period of time between its entry and the district court's restitution order at sentencing. By its terms, the order expired at sentencing; accordingly, there is no reviewable issue for the Court to consider. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990); *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988).[9]

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without specific evidence of a conscious purpose to avoid detection." Petitioners are wrong. Although the courts of appeals have articulated a variety of approaches to the question of when an instruction concerning deliberate ignorance may be given, the Second Circuit has held that there must be an evidentiary basis for a conscious avoidance charge. Thus, the court has held that a factual predicate exists for the charge when "the evidence is such that a rational juror may [conclude] beyond a reasonable doubt" that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States* v. *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993); see also *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1541-1542 & n.5 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990). The Second Circuit in this case did not address petitioners' claim that there was no evidentiary basis for a conscious avoidance instruction. There was ample evidence, however, to show that petitioners consciously avoided confirming the Medicaid fraud that was taking place at the Khan clinics.

[9] The district court clearly had the authority at sentencing, pursuant to Federal Rule of Criminal Procedure 38(e), to restrain petitioner Ross's assets pending appeal in

In any event, the district court properly restrained Ross's assets following his conviction and pending sentencing pursuant to the All Writs Act. That Act provides that a court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. 1651(a). This Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977) (approving use of All Writs Act to order telephone company to assist FBI in installing pen registers, even though no statute specifically required such assistance).

Here, based on the evidence presented at trial, the district court was persuaded that Ross should make restitution to the State of New York for the losses caused by his activities, including both the amounts he himself received and the amount paid by the State for unnecessary tests ordered under Ross's provider number. An order restraining Ross's assets was therefore necessary in order to preserve Ross's assets pending sentencing. Because the order was "necessary and appropriate in aid" of the district court's jurisdiction, it was entirely appropriate under the All Writs Act.

Ross also claims (95-290 Pet. 62-63) that the post-verdict restraining order violated his Sixth Amend-

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order to ensure compliance with the court's restitution order, and petitioner Ross does not dispute the district court's authority to do so.

ment right to use his own funds to retain defense counsel. It is doubtful that funds needed to satisfy restitution orders have any different constitutional status from forfeitable funds, see *United States* v. *Monsanto*, 491 U.S. 600, 615-616 (1989) (rejecting Sixth Amendment attack on restraint of forfeitable funds), but, in any event, petitioner's claim lacks merit. Under the pre-trial restraining order, $100,000 was made available to Ross to hire and pay for counsel of his choice. Moreover, the district court determined at sentencing that Ross had a net worth in excess of half a million dollars. The court nonetheless invited Ross's counsel to submit a brief on the issue of whether maintaining a restraining order on his assets would constitute a denial of Ross's right to counsel. Ross's counsel declined that invitation. In those circumstances, Ross's Sixth Amendment claim must fail.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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